UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER T. ENGLAND
United States Air Force

ACM S31594

27 October 2009

Sentence adjudged 21 November 2008 by SPCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

In accordance with the appellant's plea, a military judge sitting as a special court-martial convicted him of one specification of wrongful divers use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, five months' confinement, and a reduction to E-1. The

convening authority approved the bad-conduct discharge, four months' confinement, and the reduction in rank.[1]

On appeal, the appellant asks this Court to set aside his sentence and remand his case for new post-trial processing or to provide other appropriate relief. As the basis for his request, he opines: (1) the military judge abused her discretion when, over the defense objection, she allowed a witness to testify about the importance of the appellant's job to the mission, as there was no evidence the appellant's drug use impacted his ability to do his job; (2) his sentence is inappropriately severe;[2] and (3) the convening authority's action should be set aside because an incorrect personal data sheet was forwarded to the convening authority during post-trial processing. Finding no prejudicial error, we affirm.

Background

On 4 August 2008, the appellant was randomly selected for a urinalysis. He submitted a urine sample, the sample was sent to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for benzoylecgonine, a cocaine metabolite. On 28 August 2008, agents with the Air Force Office of Special Investigations summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights and confessed to using cocaine on approximately 20 occasions over the past year.

During the sentencing portion of trial, the trial defense counsel called Staff Sergeant (SSgt) AS, the appellant's supervisor, to testify about the appellant's duty performance and rehabilitative potential. On cross-examination, the trial counsel asked SSgt AS whether the appellant's job was important and the military judge, over the trial defense counsel's objection, allowed SSgt AS to answer the question. During sentencing argument, the trial counsel referred to the appellant's job, but withdrew the reference when the military judge questioned him on the relevancy of the appellant's job to sentencing.

On 3 December 2008, the trial defense counsel submitted his request for clemency on behalf of the appellant. On 15 December 2008, the acting staff judge advocate (SJA) provided the staff judge advocate recommendation (SJAR) to the convening authority. Attached to the SJAR was a 4 November 2008 personal data sheet indicating the appellant had no overseas service.[3] In reality, the appellant had deployed to Diego Garcia

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[1] The appellant and the convening authority entered into a pretrial agreement, wherein the appellant agreed to plead guilty to the charge and specification in return for the convening authority's promise not to approve confinement in excess of four months.

[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The personal data sheet admitted at trial, dated 21 November 2008, also indicated the appellant had no overseas service.

in support of operations in Iraq and Afghanistan, as noted in his 22 December 2008 clemency request. On 15 December 2008, the trial defense counsel received the SJAR. On 24 December 2008, the SJA provided the addendum to the SJAR to the convening authority.[4] The SJA attached, inter alia, a copy of the appellant's clemency request to the addendum and advised the convening authority that he must consider matters submitted by the appellant prior to taking action. The convening authority endorsed the addendum indicating he had considered the appellant's clemency request before taking action in the case.

The Testimony of SSgt AS

We review a military judge's decision to admit or exclude evidence, including sentencing evidence, for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). A military judge abuses her discretion if her findings of fact are clearly erroneous or her conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Sentencing evidence, like all evidence, is subject to the balancing test under Mil. R. Evid. 403. *Manns*, 54 M.J. at 166 (citing *Rust*, 41 M.J. at 478). When a military judge conducts a proper Mil. R. Evid. 403 balancing test, her ruling will not be overturned unless there is a clear abuse of discretion. *Id.* (citing *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)). However, when a military judge fails to conduct a proper Mil. R. Evid. 403 balancing test, we give her ruling no deference and decide the issue de novo. *See id.*

The military judge did not make findings of fact or conclusions of law before allowing the trial counsel's line of questioning regarding the appellant's job. Nor did she conduct a Mil. R. Evid. 403 balancing test. We thus decide the admissibility of SSgt AS's testimony de novo. It is unclear whether the trial counsel's questions were intended to elicit improper aggravation evidence or to test the basis of SSgt AS's opinion of the appellant's rehabilitative potential. Regardless, we note: (1) this was a bench trial; (2) the potential for unfair prejudice is substantially less at a bench trial than in a trial by members; and (3) military judges are presumed to disregard any improper testimony. *Id.* at 167 (citing *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995)); *United States v. Raya*, 45 M.J. 251, 253-54 (C.A.A.F. 1996).[5]

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[4] There is no evidence in the record that the staff judge advocate (SJA) served the addendum on the trial defense counsel. We note the addendum does not contain any new matters; thus, the SJA was not obliged to serve the addendum on the trial defense counsel. *See* Rule for Courts-Martial 1106(f)(7).

[5] Though counsel does not raise improper sentencing argument as an issue, we note the trial counsel withdrew his reference to the appellant's job and the military judge accepted trial counsel's withdrawal of the reference. Moreover, military judges are presumed to know and follow the law. *See United States v. Manns*, 54 M.J. 164, 167 (C.A.A.F. 2000); *United States v. Raya*, 45 M.J. 251, 253-54 (C.A.A.F. 1996). Such had the effect of abrogating any improper sentencing argument.

Post-Trial Advice

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Failure to timely comment on matters in the SJAR waives any later claim of error in the absence of plain error. Rule for Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citing *Kho*, 54 M.J. at 65). The *Manual for Courts-Martial, United States* (2008 ed.), mandates the SJAR include a summary of an accused's military record. R.C.M. 1106(d)(3)(C). Although not specifically required, a meaningful summary of the appellant's military record should include references to deployments and, at the very least, there is an obligation not to mislead the convening authority about the appellant's deployment history. *United States v. Lavoie*, ACM S31453 (recon), unpub. op. at 2 (A.F. Ct. Crim. App. 21 Jan 2009).

In the case at hand, the SJA failed to reference the appellant's deployment to Diego Garcia and, in so doing, erred. However, the appellant's trial defense counsel failed to timely comment on this error so the error is waived in the absence of plain error. To prevail under a plain error analysis, the appellant bears the burden of showing: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id.* at 437.

Given the evidence of the appellant's deployment found in the record of trial, the SJA's error was plain. However, this does not end our inquiry. To be entitled to relief, the appellant must show prejudice. Here, the appellant's clemency request sufficiently apprised the convening authority of the appellant's deployment history and the convening authority's endorsement of the addendum indicates he considered these matters prior to taking action. Notwithstanding the SJA's error, the appellant has failed to make the requisite showing of prejudice.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while this Court has a great deal of discretion in determining whether a particular sentence is appropriate, we cannot engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant, by his actions, seriously compromised his standing as a military member. His crime is all the more aggravating since he committed the offense, in part, in his on-base housing. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court